11-25-2015

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IN SUPREME COURT OF THE STATE OF IDAHO

ROBERT ARON KANTOR,

Plaintiff/Respondent/Cross-Appellant,

vs.

Docket No.: 41946-2014
Blaine County No. 2012-734

SONDRA LOUISE KANTOR,

Defendant/Appellant/Cross-Respondent.

ROBERT ARON KANTOR,

Plaintiff/Appellant/Cross-Respondent,

vs.

Docket No.: 42980-2015
Blaine County No. 2011-525

SONDRA LOUISE KANTOR,

Defendant/Respondent/Cross-Appellant.

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine,

Honorable Robert J. Elgee, District Judge presiding.

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ARGUMENT

Respondent (Sondra) argues that Appellant (Robert) acquiesced to the Magistrate Court's jurisdiction and cannot argue now that the Magistrate Court did not have subject matter jurisdiction.

As noted in Robert's initial brief, subject matter jurisdiction cannot be conferred upon the court by the consent of the parties. *Troupis v. Summer,* 148 Idaho 77, 79 - 80, 218 P.3d 1138, 1140 - 41 (2009). The defense of subject matter jurisdiction is never waived and it must be raised by the court if it finds that it lacks jurisdiction over the subject matter. *Fairway Dev. Co. v. Bannock County,* 119 Idaho 121, 125 - 126, 804 P.2d 294, 298 - 299 (1990). The parties to an action cannot confer nor create subject matter jurisdiction upon a court which by statute or court rule is clearly in excess of the court's authority to adjudicate. *Fairway Dev. Co.,* 119 Idaho at 125 - 126, 804 P.2d at 298 - 299 (1990).

This Court's decision in *Noble v. Fisher*, 126 Idaho 885, 889, 894 P.2d 118, 122 (1995), is instructive. The parties in *Noble* entered into a Child Custody and Property Settlement Agreement that was incorporated into their decree of divorce. One of the provisions in the parties agreement required the father to pay one-half of the parties' children's college education expenses. *Noble,* 126 Idaho at 886. The father refused to pay his one-half share of the children's college education expenses and at a hearing to increase father's child support, father moved the court to declare the college education provision void and unenforceable because it required father to provide financial support to his children after they reached majority. Id. The magistrate determined that the provision requiring father to pay one half of the children's college education expenses was void because child support ceased once the children graduated from high school or turned nineteen, whichever occurred sooner. This Court affirmed the magistrate's ruling holding that legally a parent could not be

compelled to pay post-majority child support. *Noble,* 126 Idaho at 890.

There was no question that the father in *Noble* intended that the Child Custody and Property Settlement Agreement be merged into the decree of divorce. There was no question that the father agreed to pay post-majority child support for his two college aged daughters. However, that provision in the decree could not be enforced because the magistrate court lacked subject matter jurisdiction and that provision of the decree was void.

Whether Robert acquiesced to the entry of the Supplement Judgment in this case is irrelevant to this Court's inquiry into whether the Magistrate had subject matter jurisdiction to enter the Supplemental Judgment.

Sondra argues the parties intended that their PSA would be merged into the Judgment at some time in the future. Again, this argument misses the real issue in this case. At the time the Judgment was entered there is no question the parties' intended that the PSA would not be merged into the Judgment, and the Judgment did not merge the PSA into itself. The language of the Judgment references the PSA but it does not merge the PSA into the Judgment. The intent of the parties' with respect to merger is unambiguously stated in paragraph 24 of the PSA. "The parties agree that this agreement **shall not initially be submitted to the court but shall be kept private between the two parties**." (R., p. 117, ¶ 24, emphasis added). This language is clear. The PSA was not going to be part of the Judgment.

The glaring omission from Sondra's argument, and the Magistrate Court and District Court decisions, are the lack of citation to any statute, court rule, or constitutional provision which grants a Magistrate Court the authority to reopen a closed and final Judgment and enter an entirely new judgment simply because of a contractual agreement of the parties.

There is no legal authority that allows a Magistrate Court to create a new divorce judgment after the original judgment has become final. When the Magistrate Court entered the Supplemental Decree of Divorce it did so without legal authority, and as a result the Supplemental Decree of Divorce is void. Robert cannot be held in contempt of court for violation of the Supplemental Decree of Divorce because the Supplemental Decree of Divorce is void.

As this case was pending before this Court, the District Court found that Robert should pay Sondra's attorney fees and costs because Sondra was the prevailing party on appeal, and pursuant to the terms of the PSA Sondra is entitled to her fees and costs, and the District Court also found that Robert's appeal was frivolous and therefore pursuant to Idaho Code section 12-121 Sondra was entitled to an award of her fees and costs on appeal.

The District Court's ruling on fees and costs should be overturned because if Robert is successful in this appeal Sondra will not be the prevailing party and Robert's appeal would not have been frivolous.

CONCLUSION

This Court should reverse the District Court and the Magistrate Court decisions and remand the case with instructions to dismiss the contempt filed against Robert because the Magistrate Court did not have the authority to enter the Supplemental Decree of Divorce and the Supplemental Decree of Divorce is void. No authority has been cited by the District Court, the Magistrate Court, or by Sondra which states that a closed and final judgment can be reopened by agreement of the parties, and an entirely new judgment be entered. The District Court's award of fees should be reversed because Sondra will not be the prevailing party in this case, and Robert's appeal was not frivolous. As requested in his initial brief, Robert requests that he be awarded his fees and costs in this Appeal.

DATED This 25 day of November, 2015.

LUDWIG ◆ SHOUFLER ◆ MILLER ◆ JOHNSON, LLP

By _____
Daniel A. Miller,
Attorneys for Plaintiff/Appellant/Cross-Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 25 day of November, 2015, I caused a true and correct copy of the foregoing document to be served upon the following as indicated:

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